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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/085,639	02/28/2002	Donald J. McMichael	KCX-518B (17507B)	5371

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EXAMINER

FOSTER, JIMMY G

ART UNIT	PAPER NUMBER
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3728

DATE MAILED: 08/15/2003

7

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/085,639

Applicant(s)

MCMICHAEL ET AL.

Examiner

Jimmy G Foster

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-21 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-9 and 11-21 is/are rejected.
- 7) ☒ Claim(s) 10 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 3,6.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

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1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. § 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --  
(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1-5 and 11-19 are rejected under 35 U.S.C. § 102(b) as being anticipated by Ross et al (5,318,543). In the reference of Ross et al there is provided a kit tray at 13. The tray includes a first planar surface (unnumbered) having recesses therein (unnumbered) which hold surgical procedure articles 17 and 27. There is a second planar surface (unnumbered) having a plurality of a recesses (unnumbered) therein for holding a plurality of surgical procedure articles 14, 15, 18 , 19, 23, 24, 26, etc. therein. In addition, there is provided a third planar surface (unnumbered) having a recess (unnumbered) therein for holding a surgical procedure article 16 therein. Each of said second and third planar surfaces are vertically offset from said first planar surface.

Alternatively (regarding for example Applicant's claim 15), the third may be the one which has the recess for articles such as article 26, and the second surface may be the one having the recess for holding the article 16.

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Regarding Applicant's intended use claim 17, the recesses for holding the syringes 17,27 are capable of holding a guide wire instead, even though this is not intended.

In addition, there is provided a removable container (a pouch) 20 which holds the surgical procedure articles 18 and 19. This container rests on said first planar surface, as apparent in Figure 1 of the reference and from the disclosure that the recesses of the kit correspond to the dimension and shape of the components of the kit (col. 2, lines 28-32). Further, there are provided containers/packets 21 and 23 which are shown resting in their recesses.

In addition there is provided a drape 12 which defines a cover for the tray (see Fig. 1).

As is evident from Figure 2 of the reference the article 16 extends over the article 23 and must be removed so as to provide unobstructed access to the article 23. In addition, the articles (container with articles) 18,19,20 are arranged above the articles 17,26,27 and must be removed before there is unobstructed access to the articles 17,26,27. In addition, the article 14 overlies article 24 which, in turn, overlies articles 21,22.

Regarding claim 12, the article 23 defines a looped wire. Further, the tube 14 or 24 is considered to define a gastronomy tube which is used during an endoscopic procedure. The examiner asserts that this meets the limitation of claims 13 and 14 of Applicant.

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3. Claims 1-7, 11 and 19-21 are rejected under 35 U.S.C. § 102(b) as being anticipated by Kalinski (5,311,990). In the reference of Kalinski there is provided a first planar surfaces at 101 and a recess in said planar surface defined by outer wall 90. In addition there is provided a second planar surface at 85. The first recess receives the container 55 which includes medical/surgical articles. In addition, there is provided a third planar surface above the bottom floor 85 and recesses provided therein for an additional surgical article (unnumbered), which is shown having a gun shape. In addition, there is provided a second planar surface at the bottom floor 85 itself an article holding recess therein which is shown in Figure 1 as holding the cord portion of an article. The container 55 with articles (unnumbered) obstructs access to the articles in the recesses of said second and third planar surfaces. The reference discloses that the package is intended to be adapted to contain instruments/articles for a surgical procedure.

The gun-shaped article shown in a recess in the third planar surface may be considered to include a handle (a portion of which appears to constitute a trigger on the device), which is shown in Figure 1 to have a V-shaped opening. The planar surface which constitutes the bottom floor 85 is shown in Figure 1 to include an upwardly extending boss which extends into the V-shaped opening of the handle of the gun-shaped article, insofar as Applicant has claimed in claims 6 and 7.

Although it is not clear what is the intended use of the gun-shaped article of claim 1, the examiner asserts that the

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article is inherently capable of snaring a substance since the article is shown in the figure as having an end which has a scoop or loop (it is hard to tell from the drawing).

A cover is provided at 25.

4. The following is a quotation of 35 U.S.C. § 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 3 and 4 are alternatively rejected under 35 U.S.C. § 103(a) as being unpatentable over Ross et al (5,318,543). The reference of Ross et al, at for example the recess holding the article 16, suggests that articles/components of a kit may be supported by the bottom of their recess. This would apparently provide accommodation in the recess without the need for the recess walls to graspingly retain the article and hinder selective removal of the article. Accordingly, it would have been obvious in view of this to have made the recess which receives the container 20 sized to permit the container to rest on the bottom of the recess and therefore on the first planar surface.

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6. Claims 8-10 are considered to distinguish over the prior art.

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7. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

8. Claims 1-9, 11-15 and 17-21 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 9, 10-16, and 18-21 (copending claims) of copending Application No. 10/085,630. Although the conflicting claims are not identical, they are not patentably distinct from each other because it would have been obvious to have made the invention of the present claims upon making the invention of the copending claims. For present claims 1-7, 11-15 and 17-21, the corresponding copending claims are either more specific than the present claims, or the claim language of the copending claims suggest the subject matter of the present claims. In this manner the copending claims correspond to the present claims as follows: (Present/Copending)

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1/1; 2/12; 3/1; 4/9; 5/12; 6/10; 7/11; 11/12; 12/13; 13/14;  
14/15; 15/16; 17/13; 18/18; 19/19; 20/20; 21/21.

Regarding present claims 8 and 9 it would have been obvious in view of copending claim 11 to have provided a boss member on one of the planar surfaces of the device of copending claim 5, which extends through a handle portion of the snare device recited in claim 5 for the purpose of retaining the snare device in the kit set forth in claim 5.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

9. Claims 1-9, 11-15 and 17-21 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 9, 10-16, and 18-21 (copending claims) of copending Application No. 10/085,417. Although the conflicting claims are not identical, they are not patentably distinct from each other because it would have been obvious to have made the invention of the present claims upon making the invention of the copending claims. For present claims 1-7, 11, 13-15 and 17-21, the corresponding copending claims are either more specific than the present claims, or the claim language of the copending claims suggest the subject matter of the present claims. In this manner the copending claims correspond to the present claims as follows: (Present/Copending)  
1/1; 2/12; 3/1; 4/9; 5/12; 6/10; 7/11; 11/12; 13/14; 14/15;  
15/16; 17/13; 18/18; 19/19; 20/20; 21/21.



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Regarding present claims 8 and 9 it would have been obvious in view of copending claim 11 to have provided a boss member on one of the planar surfaces of the device of copending claim 5, which extends through a handle portion of the snare device recited in claim 5 for the purpose of retaining the snare device in the kit set forth in claim 5.

Regarding present claim 12, it would have been obvious in view of copending claim 7 to have used one of the recesses of copending claim 12 for holding a looped wire for the purpose of providing a looped wire in the kit of copending claim 12.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

10. Claim 16 is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 12 of copending Application No. 10/085,630 in view of Ross et al (5,318,543). Figure 1 and reference numeral 12 of Ross et al sufficiently suggest resting a cover on peripheral edge of a surgical kit tray. This would apparently provide protection to all of the contents of the tray. It would therefore have been obvious in view of Ross et al to have rested the cover of the peripheral edge of the tray of copending claim 12 for the purpose of covering the entire top of the tray of the copending claim for protecting all of the contents of the recesses of the tray.

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This is a provisional obviousness-type double patenting rejection.

11. Claim 16 is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 12 of copending Application No. 10/085,417 in view of Ross et al (5,318,543). Figure 1 and reference numeral 12 of Ross et al sufficiently suggest resting a cover on peripheral edge of a surgical kit tray. This would apparently provide protection to all of the contents of the tray. It would therefore have been obvious in view of Ross et al to have rested the cover of the peripheral edge of the tray of copending claim 12 for the purpose of covering the entire top of the tray of the copending claim for protecting all of the contents of the recesses of the tray.

This is a provisional obviousness-type double patenting rejection.

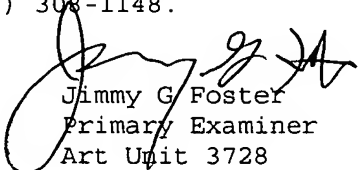
12. Claim 10 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jimmy G Foster whose telephone number is (703) 308-1505. The examiner can normally be reached on Mon-Fri, 8:45 am -5:15 pm.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mickey Yu can be reached on (703) 308-2672. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9306 for regular communications and (703) 872-9306 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1148.



Jimmy G Foster  
Primary Examiner  
Art Unit 3728

JGF  
August 8, 2003